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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. ——

STATE OF TENNESSEE
RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, AND HAMMOND FOWLER, CAYCE PENTECOST, AND JOHN C. HAMMER, AS MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE
TENNESSEE VALLEY AUTHORITY - - - *Appellants*

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
CAROLINA, CLINCHFIELD AND OHIO RAILWAY (LESSEES: ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE & NASHVILLE RAILROAD COMPANY)
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY
LOUISVILLE & NASHVILLE RAILROAD COMPANY
THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY
SOUTHERN RAILWAY COMPANY
GULF, MOBILE & OHIO RAILROAD COMPANY
ILLINOIS CENTRAL RAILROAD COMPANY
TENNESSEE CENTRAL RAILWAY COMPANY
STEARNS COAL & LUMBER COMPANY, INC.
KENTUCKY COAL AGENCY, INC. - - - *Appellees.*

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

STATEMENT

This brief is filed in opposition to separate motions to affirm of the Interstate Commerce Commission (hereinafter called "ICC") and the intervening railroads. The United States adopted a neutral position in the court below and has not moved to affirm.

For a statement of the issues presented by the appeal and the facts pertinent to the jurisdiction of the Court and the substantial nature of the issues, reference is made to appellants' jurisdictional statement. This brief supplements the jurisdictional statement to the extent necessary to reply to the motions to affirm. Since similar contentions are advanced in the two motions, a single brief is filed in opposition to both of them. The contentions as to pulpwood appear to us to be adequately covered in the jurisdictional statement and this brief is, therefore, addressed only to the contentions in the two motions with reference to coal.

ARGUMENT

I

THE DECISION IN KING v. UNITED STATES IS NOT CONTROLLING

The intervening railroads take the position that the case presented by this appeal "is on 'all-fours' with *King* v. *United States,* 344 U. S. 254." The position of the ICC is stated in less extreme language but appears to be substantially the same. We believe that this contention is fully answered in point 5 of our jurisdictional statement, under the heading "THE QUESTIONS ARE SUBSTANTIAL."

The major issues in this case as to coal are whether the ICC has authority to raise intrastate rates which are already higher and more remunerative than corresponding interstate rates, and whether it can avoid that question by failing to make a finding as to the relative level of rates when the issue is squarely presented to it on the record. No such issues were involved in the *King* case, *supra.* In that case, which involved commodities generally and not specific movements of only two commodities as here, the intrastate rates were concededly lower than the interstate rates.

We do not understand that the appellees are contending that the ICC has authority, under the guise of removing revenue discrimination against interstate commerce, to require that intrastate rates be raised above the interstate level. They seek to avoid this issue by contending (1) that the ICC was not required to make a finding as to the relative level of the interstate and intrastate rates, and (2) that its general findings 1, 2, 4, 5, and 6, taken together, are an adequate substitute for a specific finding on this issue. Irrespective of the merits of these contentions, they have no relationship to any issue presented or decided in the *King* case, *supra;* and the very fact that appellees' motions are largely devoted to these contentions demonstrates that the *King* case, *supra,* is not controlling.

We believe that both contentions are without merit, as hereinafter shown, and that the basic issues stated above, which are both new and of far-reaching importance, cannot be avoided.

II

THE INTERSTATE COMMERCE COMMISSION WAS REQUIRED BY SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT TO MAKE A FINDING ON THE RELATIVE LEVELS OF THE INTERSTATE AND THE INTRASTATE RATES.

That the relative levels of interstate and intrastate rates on coal was a "material issue of fact . . . presented on the record" (Administrative Procedure Act, sec. 8(b), 60 Stat. 242, 5 U.S.C., sec. 1007(b)), is apparent from the discussion of the ICC at sheet 22 of its report (286 I.C.C. 41, 54) in which reference is made to the contention "that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates."

Both motions appear to contend that the ICC was not required to make a finding as to the relative levels of interstate and intrastate rates on coal on the ground that appellants, in their briefs in the ICC proceedings, did not specifically ask for findings on this issue. This contention is both highly technical and without foundation.

1. Subsection (e) of Rule 91 of the ICC's General Rules of Practice states that: "Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make" (49 Code Fed. Regs., sec. 1.91 (1949)). In contrast subsection (a) of Rule 96, which governs the filing of exceptions to the examiner's

report, provides, in part: "Exceptions to the officer's report with respect to statements of fact or matters of law must be specific and must be stated and numbered separately" (*id.*, sec. 1.96).

The use of the word "should" in Rule 91(e) and of "must" in Rule 96(a) seems clearly to indicate that the former is not mandatory.

2. The brief of appellant Tennessee Valley Authority substantially complied with the provisions of Rule 91(e). This brief, which is part of the record on this appeal, was preceded by a table of contents reading in part, under the heading "ARGUMENT":

Page

II. The Carriers Have Failed to Show a Disparity Between Interstate and Intrastate Rates on Bituminous Coal Which Favors the Intrastate Transportation of this Commodity 22

A. Intrastate rates on coal are as high as or higher than interstate rates for comparable distances on the same commodity 23

B. Intrastate coal rates already yield ton-mile and car-mile revenues which are almost double those yielded by interstate rates 35

C. Intrastate coal rates yield a greater margin above the cost of the service than do interstate rates on the same commodity and cannot be regarded as constituting a burden on interstate commerce 38

The brief ended with a summary of facts which appellant Tennessee Valley Authority contended had been established, reading in part:

> Intrastate coal rates in Tennessee cannot be repugnant to the provisions of sections 13 and 15(a) of the Interstate Commerce Act as alleged in the petition unless they are lower than going interstate rates on the same commodity. The record discloses that they are not lower than going interstate rates, either when compared on a mileage basis, or on a ton-mile and car-mile earnings basis, or on a margin-above-cost basis. The contrary is true. Mile for mile, intrastate rates on coal are generally as high as interstate rates. Ton-mile for ton-mile, and car-mile for car-mile, the carriers' earnings from intrastate coal traffic already exceed those from interstate traffic. And when margins above costs are compared, going intrastate coal rates are clearly more remunerative to the carriers than interstate rates.

3. Under ICC practice, briefs are filed after the hearing before the examiner and prior to the filing of his proposed report. The case is heard by the commissioners on exceptions to the examiner's proposed report and on replies to such exceptions. The exceptions filed by appellant Tennessee Valley Authority complied strictly with the requirements of Rule 96(a). Although the examiner's proposed report recommended that the ICC not require an increase in the intrastate rates on coal, it did not include a finding on the issue of the relative levels and remunerativeness of interstate and intrastate rates. To make sure that

it was preserving its contention on this issue, appellant Tennessee Valley Authority specifically excepted to the failure of the examiner to make such a finding, exception No. 5 of its exceptions to the proposed report (also a part of the present record) reading:

> The Examiner Erred in Failing to Find That the Evidence Does Not Establish the Existence of a Disparity Between Intrastate and Interstate Rates on Coal.

Following this exception, appears a supporting statement, reading in part:

> We submit that the record establishes another ground which supports the Examiner's conclusion, to-wit, that the respondents failed to show the existence of a disparity between intrastate and interstate rates on coal which favored the intrastate transportation of this commodity. On the contrary, the evidence adduced shows that whether the comparison is made on a mileage basis, on a ton-mile and car-mile revenue basis, or on a margin-above-cost-of-service basis, intrastate coal rates in Tennessee are as high as or higher than interstate rates on the same commodity. We believe the Examiner erred in failing so to find [Exceptions, p. 6] .

4. In their reply to the exceptions, the appellee railroads took issue with this exception but interposed no challenge to the appellant Tennessee Valley Authority's right to advance it.

5. That the ICC itself recognized that the issue was before it is shown by its discussion on sheet 22 of

its report (286 I.C.C. 41, 54), referred to at pages 11-13 of appellants' Statement as to Jurisdiction, of the contention of appellant Tennessee Valley Authority "that intrastate coal rates in Tennessee are generally as high as or higher than interstate coal rates, and that the going intrastate coal rates are more remunerative to the respondents than the interstate rates."

We submit that, in the light of the foregoing facts, the technical objection now interposed by appellees is without merit. Moreover, the advancement of such an objection by the ICC contradicts its own often repeated pronouncement, in which the courts have concurred, that hard and fast rules of pleading and practice do not prevail in proceedings before it and that technical defenses should not be permitted to defeat the meting out of the substantial justice contemplated by the Interstate Commerce Act. See *Ott Coal Co.* v. *Ann Arbor R.R.*, 253 I.C.C. 677, 681; *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry.*, 201 I.C.C. 165, 171; *Flour City S.S.Co.* v. *Lehigh Valley R.R.*, 24 I.C.C. 179, 187; *Keuka Lake Ice Co.* v. *Lehigh Valley R.R.*, 172 I.C.C. 493, 494; *Spiller* v. *Atchison, T. & S.F.Ry.*, 253 U. S. 117, 127, 131; *Chesapeake & O. Ry.* v. *United States*, 11 F.Supp. 588, 592 (S.D. W.Va.), *aff'd*, 296 U.S. 187.

III

NONE OF THE FINDINGS OF THE ICC ARE A SUBSTITUTE FOR THE NECESSARY FINDING THAT THE INTRASTATE RATES ARE ON A LOWER LEVEL THAN THE INTERSTATE RATES OR CONTRIBUTE A LESSER PROPORTIONATE SHARE TO THE REVENUE REQUIREMENTS OF THE CARRIERS

Both motions, after setting out the ICC's findings in full, argue that findings 1, 2, 4, 5, and 6 constitute an adequate substitute for the express finding as to the relative existing levels of interstate and intrastate rates which the ICC has failed to make. An analysis of these findings demonstrates the contrary.

Finding 1 is that

> The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the one hand, and the adjoining States in southern territory, on the other.

This finding, which relates to commodities generally and not to coal specifically, is irrelevant. It is not contended by appellants that it costs less to handle intrastate shipments of coal than it does to handle interstate shipments for the same distance, but rather that the intrastate rates are maintained on a higher level and, accordingly, return a greater percentage above the cost of handling the traffic.

Finding 2 is that the increases authorized on interstate traffic in Ex Parte Nos. 166 and 168 are just and reasonable. The relevancy of this finding to the issue

of comparative interstate and intrastate rates is not apparent.

Finding 4 is that the intrastate rates

> . . . are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce. . . .

This finding simply states the ultimate conclusion of the ICC and to have meaning in the context of this case would have to be supported by the very type of subsidiary finding for which appellees contend it is a substitute. It is entirely possible that the ICC might conclude that even though intrastate rates are higher and more remunerative than the interstate rates, they are nevertheless not contributing their fair share of the revenue requirements of the carriers. That this may have been the ICC's view is highlighted by the fact that this finding is taken almost verbatim from finding 5 in the order involved in the *King* case (344 U.S. 254, 268 (fn. 13)), but that the significant words "are abnormally low" which appeared in that finding were omitted from this one. It is also highlighted by the statement at sheet 22 (286 I.C.C. 41, 54) that appellants did not *conclusively* prove that the intrastate rates were higher and more remunerative.

Finding 5 simply requires that the unjust discrimination referred to in finding 4 be removed by applying to intrastate traffic so much of the increases authorized

in Ex Parte Nos. 166 and 168 as the carriers maintain in effect on interstate commerce.

Finding 6 is that

> The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues.

This finding not merely fails to meet the issue but epitomizes a fundamental vice inherent in both the evidence presented by the railroads in this case and the ICC's order. There is a wide zone of reasonableness within which rates may vary without being unlawful, rates at the upper edge of the zone being commonly described as maximum reasonable rates and those at the lower edge as minimum reasonable rates. *United States* v. *Chicago, M., St. P & P.R.R.*, 294 U.S. 499, 506; *Texas & Pacific Ry.* v. *United States*, 289 U.S. 627, 636; *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 460-461. When this case was heard, appellants presented detailed evidence that the existing level of Tennessee intrastate coal rates was higher and more remunerative to the railroads than the *actual, going level* of interstate rates. The railroads, on the other hand, directed their efforts to showing that the Tennessee intrastate rates were below the level of various interstate rates approved over the years by the ICC for application as *maximum reasonable rates* (see discussion of their evidence, *infra*, pp. 18-22). But, as one of

the railroads' own witnesses freely admitted (Tr. 109-110), the going level of interstate coal rates in the South is below the maximum reasonable level. Hence, Tennessee intrastate rates may at the same time be below the maximum reasonable interstate level, and above the actual interstate level. Indeed, this is precisely the situation, as the proof shows (*infra*, pp. 16-18, 20-21). The ICC's finding 6 is simply that the intrastate rates, if increased as proposed, would not exceed the upper limits of the zone of reasonableness.

The ICC has frequently held that a mere difference in the level of rates does not make the relationship between them unlawful. E.g., *A. C. Jensen Block & Supply Co.* v. *Chicago, M., St. P. & P.R.R.*, 273 I.C.C. 399, 401; *Silverton Supply Co.* v. *Chesapeake & O.Ry.*, 273 I.C.C. 382, 387-388; *Waterloo Fruit & Comm. Co.* v. *Illinois Central R.R.*, 243 I.C.C. 271, 272. Consequently, the Tennessee intrastate rates could be increased above the interstate rates and still be within the zone of reasonableness and "not . . . unreasonable in relation to interstate rates" (finding 6). It follows that the ICC's finding, contrary to appellees' contention, does not say or even imply that the intrastate rates are presently lower than the interstate rates or will not become higher than the interstate rates if the ICC's order is allowed to stand.

In addition to the ICC's numbered findings, there is a statement on sheet 22 of its report (286 I.C.C. 41, 54), referred to in the motion of the intervening railroads, to the effect that since the ICC's decision in the Southern Class Rate Investigation in 1925, the rail-

roads have followed a policy of maintaining interstate and intrastate rates on the same level on practically all commodities, the exceptions in Tennessee being due to the failure of the Tennessee Railroad and Public Utilities Commission (hereinafter called "Tennessee Commission") to permit intrastate rates on some commodities to be increased to the full extent as interstate rates. As hereinafter pointed out (*infra*, pp. 23-25), this statement has no substantial support in the evidence. Moreover, a finding—if a statement appearing in a lengthy and uncritical summary of the evidence is entitled to be considered as a finding—as to the general policy of the railroads over a period of 25 years with reference to commodities generally is no substitute for a finding as to the relative levels of interstate and intrastate coal rates at a specific time when the relative level of such rates is put in issue.

Faced with the basic issue of the relative levels and remunerativeness of interstate and intrastate rates on coal, the ICC has avoided the issue instead of meeting it. Whether the existing intrastate rates on coal are higher or lower than the interstate rates is a simple question of fact which can be answered in plain language. The parties and the courts are entitled to an unequivocal finding on it so that the courts can determine whether the statutory standards have been correctly applied. The ICC should not be able to retreat behind vague, general findings as it has attempted to do in this case. See *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *United States* v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499, 510-511.

The argument advanced in the motions appears to be not so much that the foregoing findings have any real bearing on the relative levels of interstate and intrastate rates, but rather that these findings must be adequate because they are almost identical with those approved by this Court in *King* v. *United States,* 344 U.S. 254. This argument only serves to demonstrate the inadequacy of the findings in this case. The concept of due process as applied to administrative proceedings, and as codified in the Administrative Procedure Act, is that the administrative tribunal must in each case consider the specific issues involved and the evidence in the record relating thereto, and prepare findings particularly directed to and covering each such issue. That the ICC has adopted wholesale the findings from another and dissimilar case instead of making findings as to the facts at issue in this case raises a serious question as to the extent to which it gave consideration to the record in the case. If the ICC can avoid judicial review of its decisions by simply incorporating the findings approved by this Court in a different and dissimilar case, and such findings are thus to become as standardized as leases or insurance policies even though the issues before the ICC for decision are not so standardized, the provisions for a judicial review in the Administrative Procedure Act will be completely emasculated and such review, in the language of this Court in *United States* v. *Carolina Carriers Corp.,* 315 U.S. 475, 489, "has indeed become a perfunctory process." The record in this case consists of 725 pages of transcript and 85 exhibits. The

hearing occupied three days and two evenings. The record is largely occupied with transportation problems and conditions native to Tennessee and with the relative levels of Tennessee intrastate rates and interstate rates. The hearing was pointless if it culminates in a group of general standardized findings transferred bodily to a case involving a basic issue as to relative existing interstate and intrastate rates from another Section 13 case which involved no such issue.

IV

THERE IS NO SUBSTANTIAL EVIDENCE WHICH WOULD SUPPORT A FINDING THAT THE INTRASTATE RATES ON COAL WERE LOWER OR LESS REMUNERATIVE THAN THE INTERSTATE RATES

The question of substantial evidence is reached on these motions only if the Court should decide that the ICC's report contains findings on the relative level of interstate and intrastate rates which are clearly adequate. Without a full printed record, it is possible only to summarize the basic questions involved in this issue.

Because rates covering movements of coal within the South are not based on distance scales,[1] it is possible

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[1]That the rates on coal in the South are not based on distance scales is undisputed. The railroads' motion suggests, however, that they are indirectly related to mileage scales, stating that "a mileage scale is generally used in arriving at the rates from the base groups" (p. 10). We find no support in the record for this statement. The only mileage scales mentioned in the record are the Anderson and Carolina scales which were not prescribed as scales but merely used as a guide in prescribing maximum reasonable rates for a few specific movements and which are higher than the going interstate rates in Southern Territory, *infra*, pp. 22-23.

to make a valid comparison of the relative levels of interstate and intrastate rates only by examining representative samples of interstate and intrastate rates actually being charged and comparing the results in terms of: (1) Rates applicable to movements over comparable distances; (2) revenues returned by the interstate and intrastate rates, respectively, per car-mile and per ton-mile; and (3) margins which the interstate and intrastate rates return above cost.

Appellants introduced all three types of evidence in support of their contention that intrastate rates on coal were already higher and more remunerative than the interstate rates. They showed that representative intrastate rates were higher mile for mile than representative interstate rates (Ex. 60, pp. 7-24, Tr. 653); that they return greater revenue per car-mile and per ton-mile (Ex. 60, pp. 1-3, Tr. 653); and that they return a higher margin above cost (Ex. 62, Tr. 681; Ex. 63, Tr. 682). The railroads offered no cost evidence and no revenue comparisons; the only rate comparisons offered by them are found in witness Keubert's exhibits 5, 6, and 7 (Tr. 120), which support appellants' contentions. Exhibit 5, for example, compares 12 actual intrastate movements of coal with 17 interstate coal movements to the same destinations but from different origins. For eight of the intrastate movements, corresponding interstate movements for comparable distances are

shown.[2] The rates applicable to five of these intrastate movements are higher than the comparable interstate rates. Two are lower than the interstate rate but become higher if the order in this case is allowed to stand. The remaining one is lower than the comparable intrastate rate and will be on the same level if this order is allowed to stand. The comparisons, grouped according to similar distances, are shown in the following table compiled from Exhibit 5:

Interstate Rates		Intrastate Rates		
Distance (miles)	Interstate Rate (cents)	Distance (miles)	Intrastate Rate (cents)	Intrastate Rate With Interstate Increases (cents)
87	183	80	200	218
116	183	95	206	224
125	183	97	206	224
		117	206	224
169	275	169	267	287
		170	254	275
182	286	186	274	293
290	305	264	348	360

Exhibit 6 is a further comparison of interstate and intrastate rates. The intrastate rates shown in this exhibit of $2.00 for 80 miles and $2.06 for distances of

[2]No interstate rates are shown for distances as low as 60, 62, and 76 miles, as to which intrastate rates of $1.34, $1.93, and $1.60 respectively are shown; however, the $1.93 rate for 62 miles can be compared with the interstate rate of $1.83 for distances up to 125 miles. The intrastate rate of $1.60 shown for a distance of 103 miles is a special rate on small sizes of coal known as steam coal. It is somewhat lower than the $1.74 interstate rate on steam coal shown for 87 miles; however, it appears from lines 32 and 33, sheet 1 of Exhibit 5, that this rate probably applies for distances of 116 and 125 miles also.

95, 97, and 117 miles may be compared with the rate of $2.00 for 113 miles from the Louisville & Nashville Railroad West Kentucky mines to Nashville (erroneously shown on the exhibit as $2.24; Tr. 128). Exhibit 7 is discussed, *infra* pp. 20-21.

As pointed out in our jurisdictional statement (page 12, fn. 16), application of cost scales to a composite of the movements shown in Exhibits 5, 6, and 7, shows that on the average the rates on the intrastate movements listed therein return a higher percentage above cost than do the rates on the interstate movements.

The railroads tried this case before the ICC, and the motions to affirm filed by the ICC and the intervening railroads treat the case now, as though the issue were one involving the prescription of maximum reasonable rates by the ICC. The determination of what constitutes a maximum reasonable intrastate rate is the function of the Tennessee Commission. The jurisdiction of the ICC is reached only when the Tennessee Commission prescribes a rate that imposes a burden on interstate commerce.

As already pointed out, *supra*, p. 11, there is a wide zone of reasonableness within which railroads have managerial discretion as to the level of rates to be charged. A maximum reasonable rate represents the top limit beyond which they cannot go. If interstate rates on coal in the South were maintained on a maximum reasonable basis, the railroads would be justified in comparing intrastate rates with maximum reasonable rates; but where, as here, the interstate rates are

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below the maximum reasonable level, a comparison of actual intrastate rates with the present day equivalent of maximum reasonable rates authorized by the ICC at some time in the past is a comparison of totally unlike things.

The absence of any substantial evidence in the record that intrastate rates without the increases are lower than interstate rates with the increases is shown by the material cited in the two motions to affirm for the proposition that the record contains such evidence. The ICC relies on portions of the ICC's report (286 I.C.C. 41, 47-51); on pages 240-253, 300-302, and 474-478 of the transcript; and on "Exhibit 7, page 9, Exhibit 11."[3] None of these references support the ICC's position.

The pages of the ICC's report referred to relate to competitive conditions and the effects of the present rate adjustment on competitive situations in certain specific instances, and have no bearing on the general levels of interstate and intrastate rates. This is equally true of the testimony on the cited pages of the transcript.

Exhibit 11 reflects again the consistent confusion in appellees' motions between actual and maximum reasonable rates. It compares existing Tennessee intrastate rates, not with going interstate rates, but with rates prescribed or approved by the ICC in a number of cases as maximum reasonable rates. There is no showing that the rates are actually in effect or move

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[3]There is no page 9 in either Exhibit 7 or Exhibit 11 (Tr. 120).

any coal, and the railroads' own evidence shows that they are above the level of presently applicable rates which do move coal. Included, incidentally, are rates authorized for application in such non-Southern Territory states as Illinois, Missouri, Indiana, Iowa, Ohio, and New York.[4]

The only evidence relevant to the issues that is cited by the ICC in its motion is Exhibit 7 which compares a single intrastate movement of coal (from Newcomb to Conasauga, Tennessee, to which a rate of $2.81 applied for a distance of 151 miles) with a number of interstate movements, a great many of which moved greater distances at lower rates or rates slightly higher. A few examples are found in the following table compiled from Exhibit 7:

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[4]That Exhibit 11 was not thought by the witness who introduced it to have any bearing on the relative level of interstate and intrastate rates is shown by his testimony on cross-examination:

"As I testified yesterday, these are rates, on the right-hand side, prescribed by the ICC and are presented here to show that the proposed rates for intrastate application, that the carriers are now asking the ICC to approve, are certainly within the reasonable limits of reasonable rates as shown by interstate movements prescribed by the Commission, as cited" (Tr. 305).

Intrastate Movement			Interstate Movements			
Sheet	Distance (miles)	Rate (cents)	Sheet	Line	Distance (miles)	Rate (cents)
2	151	281	3	2	141	238
			4	14	153	259
			4	10	155	231
			4	6	162	275
			3	1	177	189
			3	18	185	231
			2	41	208	244
			4	7	213	294
			3	36	217	297
			2	28	238	257
			4	11	249	244
			2	35	307	299
			3	27	335	299

This Exhibit, as well as Exhibits 5 and 6, discussed *supra*, pp. 16-18, fully supports appellants' position.

The intervening railroads placed major reliance on a table appearing at page 12 of their typed motion, which purports to compare intrastate with interstate rates from the Lake City, Tennessee, group to 11 destinations. They assert that the compared "rates" "completely refute appellants' contention with respect to the relative level of the interstate and intrastate rates." In fact, this table has no relation to the relative levels of interstate and intrastate rates.

Column A of this table shows the intrastate rates from Lake City, Tennessee, to various points in Tennessee prescribed by the Tennessee Commission. These are actual rates for actual intrastate movements.

Column B shows what the rates become if the ICC's order in this case is allowed to stand. On the other hand, the figures shown in columns C and D which appear under the heading "Interstate Rates" are not rates applicable from Lake City to the destinations shown and, in fact, are not rates at all. What the railroads have done in these columns is to construct hypothetical rates based upon two cases in which the ICC authorized the use of a scale as a guide for determining maximum reasonable rates from specific origins to specific destinations. In column D they have taken the scale used by the ICC in *Anderson Bros. & Foster* v. *Alabama Central R.R.*, 206 I.C.C. 175,[5] constructed hypothetical rates for the distances shown on the basis of the scale, and then added all general increases since the date of the decision. In column C they followed the same procedure with the scale used by the ICC as a guide in fixing maximum reasonable rates to destinations in the Carolinas for distances beginning at 120 miles in *Carolina Coal Consumers Conference* v. *Aberdeen & Rockfish R.R.*, 270 I.C.C. 291.

The traffic witness for the Nashville, Chattanooga & St. Louis Railway testified that interstate coal rates in Southern Territory generally are well below the Anderson scale, which is the basis of the figures shown in column D and is lower than the Carolina scale, and

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[5]The scale provides for a progression of 10 cents for each 20 miles difference in distance, beginning at 120 miles. In preparing their table the railroads have assumed that the rate of progression for distances over 120 miles can be used as a rate of retrogression back to 50 miles. There is no basis for this assumption, even if their use of the scale could otherwise be defended.

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that he doubted if his railroad would try to apply either the Anderson or Carolina scale to movements on its line if it had the authority to do so (Tr. 109-110). Since the "interstate rates" shown in columns C and D are not rates at all and are higher than the going level of interstate rates which are presently moving the traffic, they are irrelevant to the issue of relative levels of the rates at which interstate and intrastate traffic actually moves.

The motion of the intervening railroads relies also on the statement in the ICC's report (Sheet 22, 286 I.C.C. 41, 54), that the railroads have followed the policy of maintaining interstate and intrastate rates on the same level and that the exceptions in Tennessee are due to the refusal of the state commission to permit intrastate rates to be increased to the same extent as interstate rates. This statement is taken from general language in the testimony of two of the railroad officials which is unsupported by any factual evidence in the record.

The testimony of W. K. Tate, Vice President of the Nashville, Chattanooga & St. Louis Railway, contains the following:

> Q. Generally speaking, Mr. Tate, are the interstate class and commodity rates within Southern Territory on the same level as the intrastate class and commodity rates within Tennessee?
>
> A. Generally speaking they are.
>
> Q. When changes are made in the interstate class and commodity rates within Southern Ter-

ritory are like changes usually made in the intrastate class and commodity rates within Tennessee?

A. They are [Tr. 8].

J. E. Kuebert, a traffic witness for the Louisville & Nashville Railroad, testified:

Exhibit No. 15 shows class rate levels in Southern territory beginning with January 15, 1928. That is the date of the revision of class rates within Southern Territory, as the result of the Commission's decision in No. 13494. As a result of this decision the rates throughout Southern Territory were placed on a uniform level, that is with the exception of Florida. Florida was given an arbitrary in addition.

* * *

. . . Following this decision of the Commission in 13494 the carriers filed petitions with the various State Commissions and asked that they be permitted to apply the same level of rates on intrastate traffic. It is my recollection that all the states, including Tennessee, granted that. As a matter of fact, I am sure Tennessee did, and in the Tennessee decision at that time commented on the fact they thought it was a good thing, for the carriers, putting the rates on a uniform level, and the shippers also came in and said they thought it was a good thing that the rates be on a uniform level. So, following that decision, why the carriers took up the revision of the various commodities, and they did the same thing on the commodities they did to class rates and adopted a uniform level of rates on practically all the

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> commodities throughout Southern Territory, the only exception being some few commodities here and there in some Southern State that failed to go and authorize the new level of rates [Tr. 132-134].

Mr. Tate's testimony was pure generalization. That it cannot be considered applicable to particular commodities is established by his admission that he did not know whether the interstate rates on some of the commodities given special treatment by the Tennessee Commission were in fact lower than the intrastate rates (Tr. 9-10). Mr. Kuebert's testimony is a generalization, unsupported by any facts, as to what the carriers did immediately following the Southern Class Rate decision in 1928, more than 20 years before the present case was heard. Any possible implication from this testimony that a uniform level of rates on coal was then established, and should be presumed still to continue, is destroyed by the testimony of another of the railroads' witnesses that

> . . . there have been a great many changes in the rates on coal and coke since 162, 166 and 168 . . . and we make changes in rates every day. They are not static, you know [Tr. 103].

Both motions criticize the cost testimony on which appellants rely and contend that it should be ignored. The criticisms made by the ICC in its report are discussed in appellants' jurisdictional statement. The other criticisms of the cost study contained in the motions relate to the basic philosophy underlying the

use of Rail Form A to determine average costs. The principal criticism relates to the use of Rail Form A costs to determine the average cost of handling a particular commodity. The ICC has accepted Rail Form A as valid for this purpose in other cases (see, for example, *International Minerals and Chemical Corp.* v. *Atlantic Coast Line R.R.*, 269 I.C.C. 611), and has accepted it as valid in this case, subject only to the criticisms of the underlying data to which it was applied.

The railroads' motion suggests that the ICC should ignore the cost testimony on the ground that "cost is by no means the controlling factor in rate making" (p. 13). The appellees' assertion is correct as an abstract principle but it is irrelevant to the issues involved in this case. The rate making function of the ICC does not come into play unless and until it is established that a discrimination against interstate commerce exists. We submit that if the intrastate rates are in fact returning a greater margin above costs than the interstate rates, the ICC is without jurisdiction to require that they be further raised and on this issue the cost evidence is controlling. *Cf., Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567.

As pointed out in our jurisdictional statement, appellants used the best information available to them to present proof on this issue as to which the burden was on the railroads. The railroads have complete data as to the interstate and intrastate movements of coal over their lines and it was thus possible for them, by use of the ICC's Rail Forms B and C, to prepare

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a study which would give the exact cost of specific interstate and intrastate movements, individually and in total (Tr. 695). They have not chosen to present such testimony and appellants are entitled to the presumption that had it been presented it would have been adverse to their contentions (*Interstate Circuit* v. *United States,* 306 U.S. 208, 226). Rail Form A has been accepted by the ICC in prior cases, and no one but the railroads is in a position to use Rail Form B or Rail Form C because only the railroads have the information necessary to complete them. The contention that appellants' cost study should be ignored is thus a contention that no cost study should be considered except one which only the railroads can make and which they have elected not to offer.

To summarize, therefore, appellants established by cost testimony, comparisons of going interstate and intrastate rates, and comparisons of ton-mile and car-mile earnings, that intrastate coal rates are already higher than the interstate rates. Opposed to this detailed and substantial evidence is irrelevant testimony as to maximum reasonable rates and vague generalizations unsupported by proof.

We submit that neither the testimony as to maximum reasonable rates nor the generalizations constitute substantial evidence that the intrastate rates on coal are on a lower level than the interstate rates and that a finding that they are on a lower level, had one been made, would not be supported by substantial

evidence on the whole record (Administrative Procedure Act, sec. 10(e), 60 Stat. 243-244, 5 U.S.C. sec. 1009(e)); *cf., Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474.

V

THERE IS NO ADEQUATE FINDING AS TO PERSONS AND LOCALITIES PREFERENCE AND PREJUDICE

The ICC's statewide order in this case, in so far as it rests on alleged preference and prejudice as between persons and localities in intrastate and interstate commerce, is based solely on a finding that "some of the Tennessee intrastate rates unduly prefer certain shippers and localities." This is no finding at all. There is no indication as to the rates, shippers or localities involved, nor as to whether the alleged instances of discrimination are few or many.

Both appellees apparently recognize that this so-called finding will not sustain the order, and accordingly attempt in their motions to rewrite it. Specifically, they suggest that the ICC really intended to say, and the finding should be read as though it did say, that all of the Tennessee intrastate rates unduly prefer all intrastate shippers and localities, except that the intrastate rates to Nashville, Old Hickory and intermediate points taking the same rates do not prefer intrastate shippers and localities shipping coal to those destinations.

Neither the courts nor the parties should be required to guess at what the ICC meant. In the present case the Court is being asked not merely to interpret

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ambiguous language in order to select one of several possible meanings, but to read into language a meaning which cannot be derived from the words which the ICC actually employed. An ICC order, and particularly one representing an exercise of its extraordinary jurisdiction under section 13(4) of the Interstate Commerce Act,[6] should be based on findings sufficiently clear so as not to require assumptions or interpretations of any kind. *Cf., United States* v. *Carolina Carriers Corp.*, 315 U.S. 475; *United States* v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499.

A logical place to look for the interpretation of a doubtful finding in the ICC's report is in the opinion of the dissenting commissioner, who presumably participated in the Commission's discussion of the case and knew the basis on which the Commission's majority was proceeding. Commissioner Splawn's dissenting opinion shows that he did not construe the finding in the manner now contended for by appellees. His opinion reflects a Commission understanding that this finding means no more than it says. It provides no basis for an assumption that the ICC, even in its executive sessions, ever identified the places, shippers, and localities allegedly preferred or discriminated against.

> The finding that the present intrastate rates on coal result in undue prejudice and preference apparently rests upon the preliminary finding, immediately preceding the numbered findings, to the effect that *some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities in

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[6] 41 Stat. 484, as amended, 49 Stat. 543, as amended, 54 Stat. 911, 49 U.S.C. sec. 13(4).

intrastate commerce. Neither the rates, the shippers, nor the localities which are involved in this stated unlawfulness are specifically identified. Such indefinite findings clearly do not justify the exercise of our power under section 13(4) to require increases throughout the State of Tennessee. See *Wisconsin R. Comm.* v. *Chicago B. & Q.R.Co.*, 257 U.S. 563, 579, 580, and *Florida* v. *United States*, 282 U.S. 194. Presumably, therefore, this report relies primarily upon the finding of unjust discrimination against interstate commerce with respect to the rates on both coal and wood [Dissenting opinion, Report, sheet 33, 286 I.C.C. 41, 60-61].

Both motions cite *Georgia Comm.* v. *United States*, 283 U.S. 765, as sustaining the ICC's finding and order in this case relating to persons and places discrimination. The *Georgia* case involved a refusal of the Georgia Commission to permit the intrastate application of a mileage scale on chert, clay, sand, and gravel which had been prescribed by the ICC for interstate application.[7] Instead, the Georgia Commission required the railroads to fix intrastate rates in accordance with a lower mileage scale prescribed by it. The Court upheld an ICC order finding statewide preference and prejudice on the basis of typical instances in which discrimination resulted.

The case is distinguishable from the present case in two respects. In the first place, the finding of discrimination was based on the existence of intrastate rates

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[7] A similar situation was involved in *Louisiana Public Service Comm.* v. *Texas & N.O.R.R.*, 284 U.S. 125, also relied on by appellees.

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which were unquestionably lower than interstate rates for comparable distances. In the second place, the statewide order was sustained on the basis of typical instances. There is no finding in the present case of persons and places discrimination at any particular locations; neither is there a finding that the unspecified intrastate rates included in the finding that "*some* of the Tennessee intrastate rates unduly prefer *certain* shippers and localities" (emphasis supplied), are typical of the situation which exists throughout the state. A statewide order on the basis of typical instances arising out of the failure to apply to intrastate movements a distance scale prescribed for interstate movements is one thing; a statewide order on the basis of unspecified situations with reference to coal is quite another. This record abundantly establishes that neither the interstate nor the intrastate rates on coal are uniform for given distances, that such rates change from day to day, and that the competitive situations at the various marketing points in Tennessee vary widely. Since neither interstate nor intrastate coal rates are governed by distance scales, the existence of rates which prefer intrastate shippers at some points is in no way inconsistent with the existence of other rates which prefer interstate shippers at most points. The only substantial evidence is that the general level of the intrastate rates exceeds that of the interstate rates. The cases cited by appellees are thus wholly inapposite.

CONCLUSION

As outlined in appellants' jurisdictional statement, the appeal presents novel and substantial questions of great importance. It is respectfully submitted that the motions to affirm should be denied.

Respectfully submitted,

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